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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

COMMENTS OF GTE

GTE SERVICE CORPORATION, on behalf of its affiliated domestic telephone operating and interexchange companies

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COMMENTS OF GTE

GTE Service Corporation and its affiliated domestic telephone operating and interexchange companies (collectively "GTE"),[1] respectfully submit their comments in response to the *Further Notice of Proposed Rulemaking ("FNPRM")* in the above-captioned proceedings.[2] In the *Third Order on Reconsideration* released together with the FNPRM, the Commission held that incumbent LECs "must permit requesting carriers to use shared transport as an unbundled element to carry originating access traffic from, and terminating access traffic to, customers to whom the requesting carrier

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1 GTE Alaska, Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., Contel of the South, Inc., GTE Communications Corporation, and GTE Hawaiian Tel International Incorporated.

2 FCC 97-295 (released August 18, 1997).

is also providing local exchange service."[3] The *FNPRM* asks whether the Commission should permit a requesting carrier to access a dedicated or shared transport unbundled element, in conjunction with unbundled switching, to originate or terminate interstate toll traffic to customers to whom the requesting carrier does not provide local exchange service.[4] As explained herein, the proposed rule is inconsistent with Section 254 of the Act, the Eighth Circuit's *CompTel* and *Iowa Utilities Board* decisions, and the Commission's own *First Interconnection Order*. Accordingly, it should not be adopted.

I. Introduction and Summary

GTE strongly disagrees with the conclusion in the *Third Order on Reconsideration* that shared transport is an unbundled network element. Nonetheless, for purposes of these Comments, GTE assumes without conceding that the Commission has properly identified shared transport as an unbundled network element. Even with this assumption, however, the proposed rule contravenes the Act and sound public policy.

First, adoption of the rule would violate Section 254 of the Act, which requires that the Federal universal service support mechanism be "sufficient" and based on "equitable and nondiscriminatory" contributions. As the Commission has acknowledged, access charges continue to recover implicit subsidies toward the maintenance of universal service. The proposed rule, if adopted, would undermine this

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3 *Id.* at ¶ 2.

4 *Id.* at ¶ 61.

support by encouraging rampant substitution of UNEs for access services. It would also inequitably and unreasonably burden incumbent LECs (ILECS) with universal support obligations historically borne by interexchange carriers (IXCs).

Second, the proposed rule is inconsistent with the Eighth Circuit's *CompTel* and *Iowa Utilities Board* decisions. The *CompTel* case cautioned that discontinuing implicit universal service support prior to implementing a sufficient, explicit replacement mechanism, as the Commission would do here, would render universal service "nothing more than a memory." This result, the court held, was "neither intended nor foreseen by Congress." The Eighth Circuit's decisions also establish a clear demarcation between access services and unbundled network elements. The proposed rule ignores this demarcation by permitting IXCs to use UNEs to offer access even when they do not provide local exchange service to the customer. As a result, the rule would (1) violate Section 251(g), which, as the *CompTel* court explained, requires that ILECs be compensated for access "under the pre-Act regulations and rates," (2) unlawfully cede to the states regulatory authority over interstate access services, and (3) effectively permit IXCs to avoid intrastate access charges, thereby transgressing Section 2(b).

Third, the proposed rule cannot be reconciled with the Commission's unconditional conclusion that purchasers of unbundled switching obtain exclusive access to that element on a per-line basis, and therefore "[a] requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service."[5]

For these reasons, the Commission should not permit requesting carriers to use dedicated or shared transport, in combination with unbundled switching, to provide access services to customers to whom they do not also provide local exchange service.

II. The Proposed Rule Would Violate Section 254 of the Act By Encouraging Abandonment of Access Services While Those Services Still Recover Universal Service Support.

Under Section 254 of the Act, Federal universal service support must be "explicit and sufficient,"[6] and must be funded "on an equitable and nondiscriminatory basis."[7] Because access charges continue to recover implicit support toward universal service, the proposed rule fails on both counts.

The Commission has repeatedly acknowledged that interstate access charges continue to recover universal service support and will do so at least through January 1, 1999.[8] For example, the *Universal Service Order* concedes that the Commission "cannot remove universal service costs from interstate access charges until we can identify those costs, which we will not be able to do, even for non-rural ILECs, before

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5 *Order on Reconsideration*, 11 FCC Rcd 13042, 13049 (1996).

6 47 U.S.C. § 254(e).

7 *Id.* § 254(d).

8 In reality, access charges are likely to recover implicit universal service support, through separations misallocations and misassignment of various expense categories, long beyond that date.

January 1, 1999."[9] Likewise, the *Access Reform Order* admits that the initial steps toward access reform "will not remove all implicit support from all access charges immediately."[10] Indeed, certain measures adopted in the *Access Reform Order* entrench existing subsidies and even add new ones,[11] which will persist into the next century.

The failure to eliminate implicit subsidies forces incumbent LECs to set access rates that exceed economic costs in order to maintain sufficient levels of universal service support. As a result, adoption of the proposed rule would present access customers with a choice between buying (1) access services that are priced to recover universal service subsidies, or (2) service-equivalent UNEs whose rates are priced at "economic cost" – and in reality, often are set below compensatory levels because of state pricing decisions that follow the FCC's TELRIC standard.[12] The response to this

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9 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 97-157, released May 8, 1997, at ¶ 246 n.650 ("*Universal Service Order*").

10 *Access Charge Reform*, CC Docket No. 96-262, FCC 97-158, released May 16, 1997, at ¶¶ 9, 15 ("*Access Reform Order*").

11 For example, maintenance of the $3.50 cap on the primary residential subscriber line charge, implementation of the business PICC on top of a multiline business SLC that in most cases will fully recover the interstate-allocated loop cost, extended phase-out of the TIC, retention of the CCL for a substantial period, and exemption of residential and single-line business customers from recovery of interstate-allocated marketing expenses.

12 GTE does not here re-argue its opposition to TELRIC, but notes only that the pricing methodologies utilized in many states produce UNE charges that are below actual forward-looking costs (and certainly do not permit any recovery of historical costs).

choice is not difficult to predict: IXCs would desert ILEC-provided interstate access switching and transport services, and universal service support would be undermined.

The deleterious impact of such arbitrage would be exacerbated by the Commission's continuing inaction on requests for additional pricing flexibility.[13] Faced with the new competitive pressure, ILECs would be unable to re-price their services in order to respond to competition while preserving, to the extent possible, universal service support flows. In short, ILECs would be forced either to: (1) drop the price of transport services as much as permitted by the Commission's pricing rules and internalize the support burdens previously borne by access customers, or (2) retain the implicit support in their interstate access charges even as the demand for those services plummets. Obviously, neither option is attractive as a business standpoint; more importantly, neither is consistent with the Act.

Setting aside the fact that supporting universal service through access charges is not "explicit," undermining the access-derived support through adoption of the proposed rule plainly would prevent universal service support from being "sufficient." Quite simply, the Commission would be shutting off a major existing source of support without

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13 In the *Access Reform Order*, the Commission repeatedly stated that it would issue a subsequent order providing for "progressively greater flexibility in setting rates as competition develops ...." *Id.* at ¶ 14. That subsequent order, like the promised order addressing historical cost recovery (*id.*), has not been released nearly five months after adoption of the *Access Reform Order*.

implementing a replacement.[14] The costs requiring support, however – unlike the support itself – would not disappear.

Nor would requiring the ILECs to assume the support burden previously borne by the IXCs be "equitable and nondiscriminatory." Universal service always has been a shared responsibility. The ILECs met their carrier-of-last-resort obligations by providing residential service at rates that often are below cost and pricing access and certain other services above cost in order to generate offsetting subsidies. The IXCs kept their part of the bargain by contributing toward universal service support through their access payments. The proposed rule, if adopted, would effectively compel the ILECs to assume what has traditionally been the IXCs' share of the burden. Thus, rather than spreading the funding obligation more equitably, the Commission would load an even greater amount on the ILECs, contrary to Congress's explicit directive. The proposed rule, therefore, should not be adopted.

III. Adoption of the Rule Would Contravene the Eighth Circuit's *CompTel* and *Iowa Utilities Board* Decisions.

The Commission asks commenters to address whether the proposed rule is consistent with the Eighth Circuit's decisions in *CompTel v. FCC*[15] and *Iowa Utilities*

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14 Moreover, as GTE has explained in its comments in CC Docket No. 97-160, adoption of a cost proxy model, as opposed to an engineering model based on the forward-looking costs of providing universal service using in-place technology, will further detract from the sufficiency of support by artificially understating the true costs of providing the supported services.

15 *FNPRM* at ¶ 61 and note 161; *see CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

Board v. FCC.[16] As discussed below, the proposed rule is inconsistent with both of these decisions.

A. The Proposed Rule Violates the Court's Rationale In *CompTel* Regarding the Relationship Between Access Charges and Universal Service.

In *CompTel*, the Eighth Circuit upheld the validity of the FCC's "transitional" rule that permitted ILECs to assess certain interstate access charges on purchasers of unbundled network elements until no later than June 30, 1996. While that specific rule is not the focus of this rulemaking, the court's reasoning compels rejection of the proposed use of shared transport by IXCs to bypass access charges. Specifically, the *CompTel* case establishes that Congress did not intend the FCC to abandon existing sources of universal service funding prior to establishment of an explicit and sufficient replacement mechanism.

In this regard, the court recognized that "[t]o date, the subsidies necessary to achieve this [universal service] goal have been derived, at least in part, from access charges that are not cost-based," and warned that the Act "requires the reform of universal service subsidies and not, significantly, abolishment of universal service, even temporarily."[17] The court therefore concluded that, if the FCC "had not instituted an interim access charge of some sort in order to subsidize universal service for the nine months before universal service reforms are complete, we think it apparent that

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16 *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997).

17 *CompTel*, 117 F.3d at 1074.

universal service soon would be nothing more than a memory" – an "'adverse effect[] that [was] neither intended nor foreseen by Congress.'"[18]

As discussed above, by the Commission's own admission, the "reform of universal service subsidies" to date has not obviated the role of access charges in continuing to support universal service, so the need to preserve access charge revenues remains compelling. Moreover, the risk that allowing IXCs to bypass access charges would render universal service "nothing more than a memory" is even graver here than in the rule considered in *CompTel*. The court was addressing a regulatory framework in which IXCs could avoid access charges subsidies only if they also provided local exchange service to the end user. The proposed rule has no such constraint: every IXC could avoid the access charge subsidies for every end user. As the *CompTel* court explained, such a result was neither "intended nor foreseen by Congress" and should not be permitted.

B. The Proposed Rule Is Inconsistent with the Distinction Between Access Service and Unbundled Network Elements Drawn in the *CompTel* and *Iowa Utilities Board* Decisions and Thereby Violates Several Sections of the Act.

The Eighth Circuit has articulated a clear distinction between unbundled network elements and access services. In *CompTel*, for example, the court explained that it was not discriminatory to charge different rates for long distance carrier access and

18 *Id.* (quoting *First Interconnection Order* at ¶ 716).

local carrier interconnection because "the two kinds of carriers are not, in fact, seeking the same services."[19] As the court explained:

> The IXC is seeking to use the incumbent LEC's network to route long-distance calls and the newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service. Obviously the services sought, while they might be technologically identical (a question beyond our expertise) are distinct. And if the IXC wants access *in order to offer local service* (in other words, wants to become a LEC), then there is no rate differential.[20]

Likewise, the court in *Iowa Utilities Board* concluded that:

> [i]nterconnection and unbundled access are distinct from exchange access because interconnection and unbundled access provide a requesting carrier with a direct hookup to and extensive use of an incumbent LEC's local network that enables a requesting carrier to provide local exchange services, while exchange access is a service that LECs offer to interexchange carriers without providing the interexchange carriers with such direct and pervasive access to the LECs' networks and without enabling the IXCs to provide local telephone service themselves through the use of the LECs' networks.[21]

The proposed rule, contrary to the court's interpretation of the Act, would eliminate the distinction between access services and unbundled elements obtained "in order to offer local service." Under the proposal, an IXC that did not provide local service to a customer could nonetheless provide the functional equivalent of access service to that customer at the rates charged for unbundled network elements. Moreover, the particular combination addressed by the proposal – shared or dedicated transport combined with unbundled switching – would grant IXCs the "direct and

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19 *CompTel*, 117 F.3d at 1073.

20 *Id.* (emphasis added).

21 *Iowa Utilities Board*, 120 F.3d at 799 n.20.

pervasive access to the LECs' networks" that the court identified as the hallmark of local interconnection and unbundled access.

By undermining the court's distinction between access services and unbundled network elements, the proposed rule would violate the Act in three respects.

First, it would contravene Congress's directive that "the LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates."[22] If the rule were adopted, few IXCs would purchase interstate access services, and therefore LECs would not continue to provide exchange access "under the pre-Act regulations and rates." Rather, once the distinction between access services and unbundled network elements is eliminated as a practical matter (even if it persists as a theoretical matter through Part 69), Section 251(g) will be effectively eliminated as well.

Second, the proposed rule would cede authority to regulate interstate access services to the states, contrary to Section 201 of the Act. In the *First Interconnection Order*, the Commission rejected arguments that permitting entities to provide interstate access service using unbundled elements "would place the administration of interstate access charges under the authority of the states," holding that:

> [w]hen states set prices for unbundled elements, they will be setting prices for a different product than "interstate exchange access services." Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer exchange access services to interexchange carriers who do not purchase unbundled elements ...."[23]

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22 *CompTel*, 117 F.3d at 1073 (interpreting 47 U.S.C. § 251(g)).

23 *First Interconnection Order* at ¶ 358.

Clearly, this rationale would no longer apply if the proposed rule were adopted. The "different product" would be different only by virtue of its name, not in any substantive sense. In terms of functionality, access provided through the transport/switching combination would be identical to access provided under the LECs' interstate access tariffs. IXCs therefore would abandon LEC access services and the Commission would lose de facto regulatory control over interstate access charges.

Third, the proposed rule would violate the "hog tight, horse high, and bull strong" jurisdictional demarcation established by Section 2(b).[24] Although the FNPRM purports to limit the proposal to the use of the transport/switching combination for interstate access,[25] this restriction is not feasible in practice. An IXC purchasing the combination would have no incentive, and probably no ability, to block intrastate toll calls, meaning that the Commission effectively would be forcing the states to permit bypass of intrastate access charges. This, the Commission cannot do.[26]

IV. The Proposed Rule Is Inconsistent With Commission Precedent Regarding Access to and Use of the Unbundled Switching Element.

The *FNPRM* asks whether the proposed rule is consistent with the *Order on Reconsideration* regarding the use of the unbundled switching element to provide

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24 *Iowa Utilities Board*, 120 F.3d at 800.

25 *FNPRM* at ¶ 61.

26 *See CompTel*, 117 F.3d at 1075n.5.

interstate access service.[27] The clear answer is no. As the *Order on Reconsideration* explains:

> [T]he *First Report and Order* defines the local switching element in a manner that includes dedicated facilities, thereby effectively precluding the requesting carrier from using unbundled switching to substitute for switched access services where the loop is used to provide both exchange access to the requesting carrier and local exchange service by the incumbent LEC.
>
> We thus make clear that, as a practical matter, a carrier that purchases an unbundled switching element will not be able to provide solely interexchange service or solely access service to an interexchange carrier. ... Using unbundled switching elements in such a manner would be inconsistent with our statement in the *First Report and Order* that "a competing provider orders the unbundled basic switching element *for a particular line* ...."[28]

Likewise, in the *First Report and Order*, the Commission held that purchasers of unbundled elements receive "the right to exclusive access or use of an entire element."[29] The proposed rule, however, would requiring sharing of portions of the switch element between the IXC and the local service provider, contrary to the Commission's holding.

V. Conclusion

For the foregoing reasons, the Commission should not permit a requesting carrier to combine dedicated or shared transport with unbundled switching in order to

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27 *FNPRM* at ¶ 61.

28 *Order on Reconsideration*, 11 FCC Rcd 13042, 13048-49 (1996) (emphasis in original).

29 *First Interconnection Order* at ¶ 358.

originate or terminate toll traffic to customers to whom the requesting carrier does not provide local exchange service.

Respectfully submitted,

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October 2, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 1997, I caused copies of the foregoing COMMENTS OF GTE SERVICE CORPORATION to be served via hand delivery to:

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